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02-278

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March 27, 2003

Laurence H. Schecker, Esq.  
Federal Communications Commission  
~~Office of~~ General Counsel  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

RECEIVED

MAR 31 2003

Federal Communications Commission  
Office of the SecretaryRe: Review of FOIA Action  
ATA Request, Control No. 2003-023

Dear Larry:

I am writing in response to your telephone condrence yesterday with Ronnie London regarding the status of the Commission's review of staff action on the above-referenced request submitted under the Freedom of Information Act ("FOIA") by the American Teleservices Association ("ATA").

As you know, ATA filed the FOIA request October 16, 2002, in response to the Notice of Proposed Rulemaking in CG Docket No. 02-278, wherein the Commission reported it received over 11,000 complaints about telemarketing and 1,500 inquiries about predictive dialing during 2000 and 2001. 17 FCC Red 17459, ¶¶ 8, 26 (2002) ("NPRM"). After the staff considered the request for 20 business days, plus a ten-day extension, as provided under the rules, see 47 C.F.R. § 0.461(g), it determined it would take months of work and cost ATA many thousands of dollars to see the complaints and inquiries. ATA timely sought review of this decision on December 6, 2002. ATA sought expedited treatment of its request for review when the staff, which had provided a "sample" of the requested documents and was slowly providing further documents on a rolling basis, indicated it would stop processing ATA's request in view of the application for review. Even without the request for expedition, however, we expected a decision on review on or before January 23, 2003, under the twenty-day guideline in Section 0.461(k) of the rules.

During the conversation yesterday, which arose out of our inquiry regarding the status of ATA's still-pending request for review of FOIA action, you referred to the Further Notice of Proposed Rulemaking in CG Docket 02-278 that the Commission released this week. Rules and

2

Proposed Rulemaking in CG Docket 02-278 that the Commission released this week. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 03-62 (rel. March 25, 2003) ("*FNPRM*"). You suggested that we consider whether we wish to pursue our FOIA request and appeal of the staff action in the wake of the Federal Trade Commission's ("FTC") amendment of its telemarketing sales rule ("TSR"), the Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003), and the *FNPRM*. You suggested in particular that we reassess our position because the Do-Not-Call Implementation Act requires the FCC "to adopt rules," and because it sets a deadline for doing so in light of the FTC's action. The implication was, now that the Do-Not-Call Implementation Act compels the FCC to act, our inquiry into complaints and inquiries that may have motivated the *NPRM* is somehow less relevant.

Your reaction to our inquiry regarding the status of our application for review of FOIA action indicates that the Commission still does not understand the reasons why ATA seeks access to the complaints and inquiries. This perhaps explains in part why the Commission has not simply made the documents part of the record in the proceeding so that all interested parties may review them. It also does much to explain why the Commission was in no hurry to produce the documents, and has ignored our request for expeditious action on our appeal of FOIA action, which has been pending for nearly four months even though it is limited to purely legal issues.

ATA did not request access to the telemarketing complaints and predictive dialer inquiries because it questions the Commission's authority to issue the *NPRM* or to solicit comment on the effectiveness of its telemarketing rules. We did not challenge the staff's assertion, early on in this process, that the Commission may initiate a proceeding to solicit comments on a rule whenever it wishes, or that doing so ten years after initial adoption of the rule was appropriate. Our previous correspondence on this matter and our comments in the proceeding make it abundantly clear that ATA is not challenging the Commission's authority to initiate the proceeding. Indeed, ATA supports the Commission's review of its rules and suggested a number of changes we believe are needed. See, e.g., ATA Comments, CG Docket 02-278, filed Dec. 9, 2002, at 104-35.

ATA's FOIA request serves a much more basic – and more substantive – purpose. The issuance of an *NPRM* signals that the FCC is considering changing its rules, and is inquiring about the specific ways in which it might or should do so. Here, the *NPRM* suggests a number of possibilities, and seeks comment about them, including inquiring into the efficacy of a national "do-not-call" registry. A significant part of this calculus must be whether the current rules are working, and whether there is any basis for new, more onerous regulations. This is particularly important in the context of telemarketing, where the Commission's rules necessarily will affect protected speech by teleservices providers. By requesting the complaints and inquiries the *NPRM* references, ATA seeks to review the same public commentary the FCC has before it in assessing whether new rules are warranted and what the contours of those rules should be. In short, the documents are important with respect to the outcome of the proceeding.

Laurence H. Schecker, Esq.

March 27, 2003

Page 3



This continues to be a highly relevant line of inquiry. In fact, it is not only not mooted by the Do-Not-Call Implementation Act and the *FNPRM*, but public access to the complaints and inquiries is made all the more critical by recent events. You stated that the Do-Not-Call Implementation Act requires the FCC "to adopt rules" in respect of the FTC's action. That is not quite accurate. Congress was very careful, when it adopted the Do-Not-Call Implementation Act, to make clear it did not intend the FCC to prejudge the issues in Docket 02-278. Congress stated it had no "intent. . . to dictate the outcome of the FCC's pending rulemaking proceeding." Do-Not-Call Implementation Act. H.Rep. 108-8, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. 9 (Feb. 11, 2003). Congress also underscored that the FCC is still "bound by the TCPA," *id.* at 4, which necessarily includes the several criteria in 47 U.S.C. §§ 227(c)(1) & (c)(4) which the Commission must consider and/or satisfy before adopting any rule. Congress even recognized that "it is impossible for the FCC to adopt rules identical to the FCC's TSR." *Id.* Toward that end, the statute requires only that the FCC "maximize consistency" with the FTC's approach. Pub. L. No. 108-10, Sec. 3.

We assume that, notwithstanding your intimations, the outcome in Docket 02-278 has not been prejudged and is in fact very much open for careful consideration by the Commission. Indeed, one way the FCC can "maximize consistency" with the FTC's amended "TSR would be to retain most of the FCC rules essentially in their current form. Both the FCC's company-specific do-not-call rules and time-of-day restrictions were incorporated into the TSR, and the TSR analogues remain unchanged even after the FTC's recent amendments. While further discussion of any such approach is more appropriately discussed in the context of the *FNPRM*, the point here is that the FCC still has the discretion to adopt - or not adopt - new rules even under the Do-Not-Call Implementation Act, and there is still much that is open debate before the proceeding closes.

ATA therefore renews its call for the Commission to make available all the complaints and inquiries it has reviewed and will analyze in acting in Docket 02-278, and for expeditious resolution of ATA's application for review of FOIA action requesting that those materials be made available to all interested persons at little or no cost. These documents are an important part of the record in this proceeding, and it is unconscionable to withhold them from public review, or to demand upwards of \$25,000 for access. We note in this regard that, as a regulation affecting protected speech, the FCC has the burden of demonstrating that its telemarketing rules comport with the First Amendment. This means demonstrating a substantial government interest in adopting the rules, that they advance the government's interest in a direct and material way, and that they are no broader than necessary to do so. It is critical to this analysis whether the current rules are effective, whether any ineffectiveness is due to the rules themselves or failures of enforcement, and whether new rules would be effective in curing any claimed failures in the existing rules. The complaints and inquiries the Commission received under the existing rules are consequently highly relevant in guiding the outcome of the telemarketing rule review.

In closing, it has been nearly six months since ATA requested the documents referenced in the *NPRM*. ATA did not go on a rabbit hunt to determine if these documents exist - the

Laurence H. Schecker, Esq.  
March 27, 2003  
Page 4



Commission put them at issue when it adopted the *NPRM*. It has also been nearly six months since the staff claimed it would take five to six months to produce all the documents and that it would cost **ATA** approximately \$25,000 for access to them. **ATA** has diligently voiced its objection to this exorbitant demand and pursued access to the requested records. There is no justification for the Commission's delay in making the documents available to the public, as they form a vital part of the record in a rulemaking proceeding, nor is there any good reason for the dilatory approach the **Commission** has taken to resolving the legal issues involved in the FOIA appeal. **ATA** would like to believe the FCC has not prejudged the issues in the proceeding (despite your suggestion to the contrary) and it stands ready to pursue all legal avenues for ensuring access to relevant government records that may play a role in any new telemarketing rules. The FCC rules setting out its FOIA obligations clearly intend that records requests and appeals therefrom be processed expeditiously, as access delayed is so often access denied.

Very truly yours,

Davis Wright Tremaine LLP

Robert Corn-Revere  
Counsel for **ATA**

cc: **Hon** Michael K. Powell  
**Hon.** Kathleen Q. Abernathy  
**Hon** Michael J. Copps  
**Hon.** Kevin J. Martin  
**Hon.** Jonathan S. Adelstein  
K. Dane Snowden  
G.M. Matt Mattingley, **ATA**



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COMMENTS/SPECIAL INSTRUCTIONS

**Please see attached.**